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No. 94-1785

In the Supreme Court of the United States

OCTOBER TERM, 1995

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT F. LUNDY

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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When a taxpayer petitions the Tax Court for review of a deficiency asserted by the Commissioner, Section 6512(b)(1) of the Internal Revenue Code authorizes the Tax Court not only to review the claimed deficiency but also to determine the amount of any overpayment that the taxpayer may have made. 26 U.S.C. 6512(b)(1). Section 6512(b)(3)(B), however, limits the amount of any refund of an overpayment to the amount that would have been refundable under Section 6511(b)(2) if a claim for refund had been filed by the taxpayer “on the date of the mailing of the notice of deficiency” (26 U.S.C. 6512(b)(3)(B)). Section 6511(b)(2)—which Section 6512(b)(3)(B) incorporates by reference—limits the amount of any refund to the amount of the disputed taxes that the taxpayer paid (i) within the two-year

(1)

period prior to the date of the refund claim if, at the time of the refund claim, "no return was filed by the taxpayer" (26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(B)) or (ii) within the three-year period prior to the date of the refund claim if the refund claim was made "within 3 years from the time the return was filed" (26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(A)).

In the present case, respondent had failed to file any return for 1987 by the time the notice of deficiency was mailed by the Commissioner in 1990. Accordingly, on the date that the notice of deficiency was issued and the statutorily imputed refund claim arose under Section 6512(b)(3)(B), "no return was filed by the taxpayer" (26 U.S.C. 6511(a)). As the result, the refund that respondent may obtain is limited to the amount of tax that he paid during the two-year period immediately preceding the imputed refund claim. 26 U.S.C. 6511(b)(2)(B). Because no portion of the tax in issue was paid within the two-year period preceding the mailing of the notice of deficiency, respondent was barred from obtaining any refund of his overpayment. See, e.g., *Richards v. Commissioner*, 37 F.3d 587, 589 (10th Cir. 1994), petition for cert. pending, No. 94-1537; *Galuska v. Commissioner*, 5 F.3d 195, 196 (7th Cir. 1993); *Kartrude v. Commissioner*, 925 F.2d 1379, 1385 (11th Cir. 1991); cases cited Pet. Br. 22.

For the reasons set forth in detail in our opening brief, the contrary conclusion of the court of appeals in this case disregards the text of the statute and misinterprets its history. Indeed, neither respondent nor the *amicus curiae* directly attempts to defend the reasoning of the court of appeals. Instead, they offer

a variety of alternative rationales, none of which withstands scrutiny.

1. The two principal arguments advanced by respondent were not addressed by the court of appeals.

a. Respondent offers, as his first alternative argument (see Resp. Br. 16 n.6), the suggestion that Section 6512 does not control the determination of the limitations on his refund in Tax Court. He notes that, after the notice of deficiency was issued in September 1990, he filed a belated return with a refund claim in December 1990. He further notes (Resp. Br. 14-15) that the belated return was filed within three years of its lawful due date (April 1988) and asserts that the associated refund claim would therefore trigger the three-year refund period that he claims would be applicable in federal district court under Section 6511(b)(2)(A).

The question whether, on these facts, respondent *could* have brought a refund suit in federal district court is obviously not presented in this case. That question, on which courts have reached different conclusions, involves different statutory language than the question presented in this case. See Pet. Br. 29-30. The present case arose in Tax Court, not in district court. For Tax Court cases, Congress fashioned statutory language in Section 6512 that incorporates some of the provisions of Section 6511 but tailors them to the specifics of Tax Court litigation.

The events that bear on the determination of the refund period in Tax Court cases are specifically set forth in Section 6512(b)(3). Under that Section, the refund period is to be determined as if a refund claim had been filed "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)) unless a refund claim had *actually* been filed "*before*

the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(C) (emphasis added)). The statute does not provide, as respondent suggests, any additional jurisdiction in Tax Court for refund claims made "after" the notice of deficiency is issued.

Respondent's contention that a *subsequent* refund claim expands the refund period in Tax Court proceedings thus simply ignores, and departs from, the plain text of the applicable statute. The Tax Court is a court of limited jurisdiction (*Commissioner v. McCoy*, 484 U.S. 3, 7 (1987) and the limitations that Congress has imposed on that court's jurisdiction to award recoveries against the government "must be strictly adhered to by the judiciary" (*Kavanagh v. Noble*, 332 U.S. 535, 539 (1947))).

b. Turning to the text of the applicable statute, respondent asserts that if Section 6512 were amended only slightly it could be read to permit his recovery in this suit. Disregarding the actual text of the statute, respondent asserts (Resp. Br. 16-21) that the statute does not—as its language states—direct the Tax Court to assume that "on the date of the mailing of the notice of deficiency a [refund] claim had been filed" by the taxpayer (26 U.S.C. 6512(b)(3)(B)) and to then determine, based on that assumption, the amount of the taxpayer's overpayment that would be refundable under Section 6511(b)(2). Instead, respondent claims that Section 6512(b)(3)(B) should be read to direct the Tax Court to make a determination as to whether the taxpayer "could have filed a claim for refund" on the date the notice of deficiency was mailed (Resp. Br. 17). If the taxpayer "could have filed" a timely refund claim on that date, respondent contends, then the taxpayer should be allowed to recover the amount

of any tax overpayment that was paid within the three-year period immediately preceding the issuance of the notice of deficiency (Resp. Br. 16 & n.6).¹

Respondent's "could have filed" construction of Section 6512(b)(3)(B) suffers from the obvious flaw that it deviates from the actual language of that provision. Section 6512(b)(3)(B) states that no refund shall be allowed for any overpayment of tax except to the extent that the Tax Court determines that it was paid (26 U.S.C. 6512(b)(3)(B) (emphasis added)):

within the period which would be applicable under section 6511(b)(2) * * *, if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) * * *.

As the courts of appeals and the Tax Court had consistently held prior to the decision in this case, the language of Section 6512(b)(3)(B) directs the Tax Court to treat the taxpayer as if he had filed a claim for refund on the date the notice of deficiency was mailed and then to apply the limitations provisions of Section 6511(b)(2) to that imputed claim for refund.

¹ That contention is undergirded by the assertion that a return and refund claim filed more than two years after the tax is paid would be effective to invoke the three-year limitations period in a district court refund suit under Section 6511(a). That assertion was squarely rejected by the Ninth Circuit in *Miller v. United States*, 38 F.3d 473, 476 (1994). See also *Oropallo v. United States*, 994 F.2d 25, 30 (1st Cir. 1993) ("We have assumed [for the sake of argument] that a return can be filed at any time after its due date and still be a return for purposes of filing a claim within that three-year period. Under that interpretation, the limitations period in section 6511(a) is totally illusory."), cert. denied, 114 S. Ct. 705 (1994). See Pet. Br. 29-30 & nn.11, 12.

Because "no return was filed by the taxpayer" (26 U.S.C. 6511(a)) before the notice of deficiency was issued by the Commissioner, respondent may recover only that portion of the overpayment that he paid within the two-year period preceding the notice (26 U.S.C. 6512(b)(3)(B), incorporating 26 U.S.C. 6511(b)(2)(B)). See, e.g., *Richards v. Commissioner*, 37 F.3d at 589; *Galuska v. Commissioner*, 5 F.3d at 196.

Respondent's proposed reconstruction of Section 6512(b)(3)(B) has no connection to the actual language of that provision. The principal substantive difference between the text of the statute and respondent's proposed revision is that, under respondent's view, the requirement that taxpayers submit income tax returns would become irrelevant. Under the statute, a refund claim is not effective to invoke the three-year limitations period unless it is filed with or following a return. *Richards v. Commissioner*, 37 F.3d at 589. A refund claim that is filed before the return is filed is

not filed "within 3 years from the time the return was filed." 26 U.S.C. § 6511(a) (emphasis added). The ordinary understanding of the words "from the time" implies that the taxpayer must file the return prior to filing the claim in order to benefit from the three-year refund period.

Richards v. Commissioner, 37 F.3d at 589. Accord, *Galuska v. Commissioner*, 5 F.3d at 196; *Anderson v. Commissioner*, 74 A.F.T.R.2d ¶ 94-6222, 94-6223 (4th Cir. 1994); *Kartrude v. Commissioner*, 925 F.2d at 1385; *Allen v. Commissioner*, 99 T.C. 475, 479 (1992), aff'd, 23 F.3d 406 (6th Cir. 1994).

Under respondent's view, however, the requirement of Section 6511(a) that an income tax return be filed before the refund claim is filed (to invoke the three-year period of limitations) would become irrelevant because respondent "could have filed" his return at any time, even several years after it was due.² By making it irrelevant whether or not a return actually has been filed as of the date the notice of deficiency is issued, respondent's proposed reconstruction of the statute would result in a blanket allowance of a three-year period of limitations for refund claims in Tax Court.³ It is obvious, however, that Congress did

² See note 1, *supra*. Even though an additional tax obligation may accrue from the failure to file a timely return (see 26 U.S.C. 6651(a)), a belated income tax return may be filed by any taxpayer at any time. In this case, respondent's return was due on April 15, 1988. The late filing of that return (in December 1990) could have exposed respondent to additional tax obligations; but the fact that the return was untimely does not mean that it could not be submitted late.

³ The various legislative reports that respondent cites in support of this proposition (Resp. Br. 18-21) provide no basis for flouting the direct command of the plain language of Section 6512(b)(3)(B). See Pet. Br. 23-26. In particular, the 1962 amendment that respondent cites added a provision to the statute that expressly authorizes refunds in Tax Court cases in which the taxpayer had filed a refund claim "before the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(C) (emphasis added)). Respondent states that this amendment "is not pertinent to the issue here" (Resp. Br. 21) but asserts that its legislative history is.

The Senate Report to the 1962 amendment states that the statute as amended permits refunds in Tax Court "where valid claims have been timely filed, as well as where these claims could have been filed on the date of the mailing of the notice of deficiency." S. Rep. No. 2273, 87th Cong., 2d Sess. 15 (1962). Respondent asserts that this Report supports the

not intend to adopt an automatic three-year period of limitations for refund claims asserted in Tax Court proceedings. Instead, Congress specified that if "no return was filed" as of the date of the issuance of the notice of deficiency, only a two-year period of limitations applies. 26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(B), incorporated by reference in 26 U.S.C. 6512(b)(3)(B). By ignoring the language that Congress enacted, respondent's contention deprives the intricate distinctions that Congress drew in enacting Sections 6511 and 6512 of any meaning.

2. The central tenet of respondent's position is the theory that Congress intended a taxpayer in all circumstances to be able to obtain a refund of any overpayment of tax made within the 3-year period immediately preceding the date of filing his claim for refund. That contention contradicts the actual terms of the limitations on refunds of tax overpayments imposed by Congress in Sections 6511 and 6512 of the Code.

a. Section 6511(a) provides that a claim for refund "*of any tax imposed by this title in respect of which tax the taxpayer is required to file a return* shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time

view that Section 6512 broadly permits a three-year refund period whenever a valid claim "could have been filed on the date of the mailing of the notice of deficiency." What respondent ignores in making that contention, however, is that a "valid claim" may give rise to only a two-year refund period, rather than a three-year refund period. Under Section 6511(a), a valid claim gives rise to only a two-year refund period if, when the claim is filed, "no return was filed" (*ibid.*). That is the situation that exists in this case.

the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid." 26 U.S.C. 6511(a) (emphasis added). When the taxpayer has not filed his return at the time that he files his refund claim, the refund claim is timely only if it is filed within two years of the date that the tax was paid. *Ibid.* Under the corresponding provisions of Section 6511(b)(2)(B), which Section 6512(b)(3)(B) incorporates by reference, a taxpayer who files a claim for refund without filing a tax return is therefore limited to recovering only that portion of the tax overpayment that was paid within the two-year period preceding the filing of the claim for refund.

Since respondent had not filed his return as of the imputed filing date of his claim for refund under Section 6512(b)(3)(B) (the date the notice of deficiency was mailed),⁴ respondent was limited by Section 6511(b)(2)(B) to recovering the portion of his

⁴ Respondent chides the Commissioner for using the phrase "imputed refund claim" to describe the operation of Section 6512(b)(3)(B). Contrary to respondent's statement (Resp. Br. 23-24), the Commissioner does not assert that a notice of deficiency is equivalent to a claim for refund. Instead, under the specific text of Section 6512(b)(3)(B), the mailing of the notice of deficiency simply establishes the date that the Tax Court is to assume as a matter of law that a refund claim was filed (even though one was not filed) for purposes of applying the limitations provisions of Section 6511. See, e.g., *Richards v. Commissioner*, 65 T.C.M. (CCH) 2137, 2138 (1993) (Section 6512(b)(3)(B) "tests the applicable limitations period of section 6511 against a hypothetical claim for refund filed on the date the notice of deficiency was mailed"), *aff'd*, 37 F.3d 587 (10th Cir. 1994), petition for cert. pending, No. 94-1537.

overpayment that was paid within the two-year period preceding the date of his imputed refund claim. Because it is undisputed that no portion of respondent's tax overpayment was paid within the two-year period preceding the filing date of his imputed claim for refund (Pet. App. 2a), the Tax Court correctly held that it lacked jurisdiction to award a refund in this case.

b. In an effort to avoid the mandate of Sections 6511 and 6512, respondent (Resp. Br. 13-14) and the *amicus curiae* (Am. Br. 16-22) assert that the second clause of the first sentence of Section 6511(a)—which states that “if no return was filed by the taxpayer” the claim for refund must be filed “within 2 years from the time the tax was paid”—applies only to taxes for which no return is *required* to be filed. Under that theory, the two-year period under the statute would have no application to refund claims for income, estate, gift or other taxes for which a return is required to be filed.

That implausible assertion has no support in the case law. The short answer to respondent's argument is that Section 6511(a) states that if no return *was* filed by the taxpayer he must file his claim for refund within two years from the time the tax was paid. The statute does not state that if no return was *required* to be filed by the taxpayer, then only a two-year filing period for the taxpayer's refund claim is allowed. Moreover, the clause “if no return was filed” is part of the first sentence of Section 6511(a), which, by its express terms, applies to any “[c]laim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return.” 26 U.S.C. 6511(a). By contrast, the *second* sentence of Section 6511(a)

applies to any “[c]laim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp”—for which no return is required under the Code—and provides that such claims must be filed within *three years* from the time the tax was paid. *Ibid.* The *first* sentence of Section 6511(a) thus necessarily applies, as its language states, to any claim for refund of tax where a taxpayer “is required to file a return” but has failed to do so as of the time the claim for refund is filed. 26 U.S.C. 6511(a).⁵ Because “no return was

⁵ This construction of Section 6511 is confirmed by Treasury Regulation § 301.6511(a)-1, which was promulgated by the Secretary of the Treasury in 1956 (T.D. 6172, 1956-1 C.B. 565, 567-568, 578). The regulation provides (26 C.F.R. 301.6511(a)-1 (emphasis added)):

(a) *In the case of any tax (other than a tax payable by stamp):*

(1) If a return is filed, a claim for credit or refund of an overpayment must be filed by the taxpayer within 3 years from the time the return was filed or within 2 years from the time the tax was paid, whichever of such periods expires the later.

(2) If no return is filed, the claim for credit or refund of an overpayment must be filed by the taxpayer within 2 years from the time the tax was paid.

(b) *In the case of any tax payable by means of a stamp*, a claim for credit or refund of an overpayment of such tax must be filed by the taxpayer within 3 years from the time the tax was paid. For provisions relating to redemption of unused stamps, see section 6805.

This long-standing regulation is a reasonable interpretation of the statute that is consistent with its terms. Under the regulation, respondent's assertion that the second clause of the first sentence of Section 6511(a) applies only to taxes in respect of which a return was *not* required to be filed must be rejected. See *National Muffler Dealers Ass'n v. United*

filed by" respondent as of the time of the mailing of the notice of deficiency, he was barred by Section 6512(b)(3)(B) from recovering any portion of his tax overpayment that was paid more than two years before that date. *Galuska v. Commissioner*, 5 F.3d at 196 & n.2. See also *Miller v. United States*, 38 F.3d at 475.

3. a. The *amicus curiae* does not dispute that, under Section 6512(b)(3)(B), the refund period in Tax Court cases is to be calculated as if respondent had filed a claim for refund "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)). The *amicus* maintains, however, that it should also be assumed that the taxpayer filed a tax return on that same date reporting an overpayment of the tax.⁶ The *amicus* asserts that, if both the return and the refund claim were assumed to have been filed on the same date, the three-year period of limitations under Section 6511(a) would then apply (Am. Br. 1-24). But see note 1, *supra*.

The contention that a hypothetical tax return should be assumed to have been filed on the date that the notice of deficiency was mailed is inconsistent with both the text and the logic of the statute. The statute directs the Tax Court to determine the amount of the overpayment that would be refundable under Section 6511(b)(2) if it were assumed that the taxpayer had filed a "claim for refund" on the date the

States, 440 U.S. 472, 476 (1979) (quoting *United States v. Cartwright*, 411 U.S. 546, 550 (1973)) (Treasury regulations, "if found to 'implement the congressional mandate in some reasonable manner,' must be upheld").

⁶ Respondent advances the same contention as an alternative to his principal assertions. See Resp. Br. 26-29.

notice of deficiency was mailed. 26 U.S.C. 6512(b)(3)(B). The statute does not provide, as respondent and the *amicus* suggest, that the Tax Court is to determine the amount refundable under the applicable subparagraphs of Section 6511(b)(2) on the assumption that the taxpayer filed *both* a return *and* a refund claim on the date of the mailing of the notice of deficiency.

Respondent claims that, if a taxpayer were deemed under Section 6512(b)(3)(B) to have filed his tax return on the date the notice of deficiency was mailed, as well as deemed to have filed his claim for refund on that date, the taxpayer would then be entitled under Section 6512(b)(3)(B) to obtain a refund of the amount of his overpayment that was paid within the three-year period immediately preceding the mailing date of the notice of deficiency. But see note 1, *supra*. If Congress had intended to adopt such a flat three-year rule, however, it would have specified in Section 6512(b)(3)(B) that the Tax Court is authorized to determine an overpayment with respect to all amounts paid within the three-year period preceding the issuance of the notice of deficiency. Instead, by directing the Tax Court to determine the amount of the overpayment that would be refundable under the applicable subparagraph of Section 6511(b)(2) on the assumption that the taxpayer had filed a "claim for refund" on the date the notice of deficiency was mailed, Congress expressly incorporated the separate two-year and three-year limitations periods of Section 6511(b)(2). See 26 U.S.C. 6512(b)(3)(B). By adopting both limitations periods, Congress manifestly did not intend that *all* taxpayers invoking the Tax Court's jurisdiction would be entitled to the three-year period of limitations on overpayments.

The courts of appeals have recognized that the language of Section 6512(b)(3)(B) can not be construed in the manner urged by respondent and the *amicus curiae*. "When the Tax Court determines whether an overpayment is refundable under Section 6512(b)(3)(B), the Internal Revenue Code does not empower the Tax Court to treat a taxpayer like Galuska who has not filed a return as of the date the deficiency notice was mailed as if he had filed a return by that date." *Galuska v. Commissioner*, 5 F.3d at 197. See also *Anderson v. Commissioner*, 74 A.F.T.R.2d at 94-6224 ("Although the Andersons are treated as if they had filed a claim on the date the deficiency notice was mailed, 26 U.S.C. Section 6512(b)(3), they are not also treated as having filed a return on that date.").

b. As the *amicus curiae* points out (Am. Br. 9), a claim for refund of income taxes is, "[i]n general," to be "made on the appropriate income tax return." 26 C.F.R. 301.6402-3(a)(1). It does not follow, however, as *amicus* contends, that a claim for refund and a tax return are synonymous documents. It has "long been accepted" that a claim for refund need not be submitted on a return and that "[t]here are no rigid guidelines" governing the content of a claim for refund except that it "must have a written component and 'should adequately apprise the Internal Revenue Service that a refund is sought and for certain years.'" *Arch Engineering Co. v. United States*, 783 F.2d 190, 192 (Fed. Cir. 1986), quoting *American Radiator & Standard Sanitary Corp. v. United States*, 318 F.2d 915, 920 (Ct. Cl. 1963). See also *Estate of Hale v. United States*, 876 F.2d 1258, 1261-1262 (6th Cir. 1989); *Furst v. United States*, 678 F.2d 147, 151 (Ct. Cl. 1982); M. Saltzman, *IRS Practice*

and Procedure ¶ 11.08[2], 11-60 (2d ed. 1991). The following documents have been held sufficient to constitute a "claim for refund" under Section 6511(a) of the Code (*id.* at 11-62 (citing cases; footnotes omitted)):

a notation on the back of a check paying the tax, a written protest prior to or accompanying a payment of a tax (even where contingent on the occurrence of a future event), a letter attached to a return protesting the constitutionality of an imposed tax, a letter attached to a waiver of restrictions on assessment, and a letter agreeing to payment of tax in installments.

The fact that a "claim for refund" is not the equivalent of, or a necessary component of, a tax return is demonstrated by the text of the very statutes that this case involves. Section 6511(a) clearly establishes that Congress understands that claims for refund and tax returns are discrete, not interchangeable, documents.⁷ Section 6511(a) provides that a "[c]laim for credit or refund of an overpayment" is to be filed (26 U.S.C. 6511(a) (emphasis added)):

within 3 years from the time *the return was filed* or 2 years from the time the tax was paid, whichever of such periods expires the later, or if *no*

⁷ Other provisions of the Internal Revenue Code similarly reflect that tax returns are distinct from claims for refund. Compare 26 U.S.C. 6012 (persons required to make returns of income), 26 U.S.C. 6651 (imposing an addition to tax for failure to file required returns), and 26 U.S.C. 6501(a) (imposing, in general, a three-year statute of limitations on assessment from the time the return was filed), with 26 U.S.C. 6511 (imposing time limits for filing a claim for refund and limiting amount of refunds based on when the claim was filed) and 26 U.S.C. 7422 (precluding the filing of a suit for refund unless a timely claim for refund previously has been filed).

return was filed by the taxpayer, within 2 years from the time the tax was paid.

The statutory limitations period for filing a claim for refund is thus specifically based on when, and whether, the *separate* event of the filing of the taxpayer's return occurred. As the Fourth and Seventh Circuits have held, when Congress directed the Tax Court in Section 6512(b)(3)(B) to determine the limitations period for refunds under the applicable provisions of Section 6511(b)(2) on the assumption that the taxpayer filed a "claim for refund" on the date the notice of deficiency was mailed, it plainly did not intend the Tax Court to make the further assumption that the taxpayer filed his return at the same time. *Galuska v. Commissioner*, 5 F.3d at 197; *Anderson v. Commissioner*, 74 A.F.T.R.2d at 94-6224.*

4. a. Respondent has filed numerous materials with this Court in the form of a lodging. None of these materials were submitted as evidentiary materials in the Tax Court and they do not form part of the formal record of this case. Some of the materials were appended to respondent's brief in the court of appeals; some of them post-date the briefing in the

* "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983), quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). See also *Arizona Elec. Power Co-op, Inc. v. United States*, 816 F.2d 1366, 1375 (9th Cir. 1987) ("When Congress includes a specific term in one section of a statute but omits it in another section of the same Act, it should not be implied where it is excluded.").

court of appeals and have simply been lodged by respondent with this Court in the first instance.

The materials in the lodging purport to describe generic pronouncements of the Commissioner's concern that late-filed returns often preclude taxpayers from obtaining refunds to which they would otherwise be entitled. Those generic pronouncements obviously have no relevance to resolution of the legal question of the proper scope of the Tax Court's jurisdiction under the statutes that govern this case.

b. Respondent incorrectly asserts (Resp. Br. 32) that the long-standing interpretation of Section 6512(b)(3)(B) that the Tax Court described in this case, and that numerous courts of appeals have adopted, reflects only a recent analysis that departs from administrative practice. In particular, respondent erroneously claims that "the IRS changed its administrative practice sometime around 1991" (Resp. Br. 32).

As we describe in our opening brief, for at least twenty years the Internal Revenue Service—like the Tax Court and five of the courts of appeals—has consistently interpreted Section 6512(b)(3)(B) to limit Tax Court refunds in cases of this type to the amount of taxes paid within the two-year period preceding the notice of deficiency (Pet. Br. 27-28, citing cases; see also Pet. Br. 27 n.9). For example, in *White v. Commissioner*, 72 T.C. 1126, 1131 (1979), the Tax Court agreed with the Commissioner that the two-year period of limitations applies under Section 6512(b)(3)(B) when the taxpayer had failed to file a valid return before the notice of deficiency was issued. The court of appeals acknowledged in this case that numerous Tax Court decisions reach the same conclusion (Pet. App. 20a & n.11), and respondent fur-

ther acknowledges that this understanding of Section 6512(b)(3)(B) had long been "suggested" in the case law (Resp. Br. 9).

Nothing in the lodged materials supports a conclusion that any different administrative practice has existed. Moreover, this case involves the question of the proper scope of the statutory jurisdiction of the Tax Court to award refunds of overpayments. If any administrative practice were thought relevant to that determination, it would presumably be the practice of the Tax Court, not the practice of the Internal Revenue Service. And respondent correctly acknowledges (Resp. Br. 9) that the Tax Court has consistently held that recoveries of overpayments are not available in the context of this case.

5. In enacting generic statutes of limitations, Congress is responding principally to the facts that it anticipates will arise in typical cases. In the typical tax case, the taxpayer will file a timely return and the government will issue a notice of deficiency close to the end of the third year after the return was filed. In that typical case, Section 6512(b)(3)(B) operates to permit the taxpayer to claim an overpayment and refund in his petition to the Tax Court even though the 90-day period for filing his petition under 26 U.S.C. 6213(a) would extend beyond the three-year period from the filing of his return.

When the taxpayer has failed to file a timely return, however, the Tax Court has no jurisdiction to award an overpayment made more than two years before the notice of deficiency is issued. See, *e.g.*, *Galuska v. Commissioner*, 5 F.3d at 196. It is thus the failure of respondent to file a timely return, and not any administrative action or inaction of the Commissioner, that resulted in the statutory bar against

respondent's refund claim in Tax Court under Section 6512(b)(3)(B). Respondent disagrees that this legislative determination expresses good public policy (Resp. Br. 41-43). But the determination of good public policy is unquestionably reserved to the legislature (*New Jersey v. Anderson*, 203 U.S. 483, 490 (1906)):

[C]onsiderations of this character, however, properly addressed to the legislative branch of the government, can have no place in influencing judicial determination. It is the province of the court to enforce, not to make the laws, and if the law works inequality the redress, if any, must be had from Congress.

See also *United States v. Calamaro*, 354 U.S. 351, 357 (1957).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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